United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2113.

ELLSWORTH T. SIMPSON, TRADING AS PARKWAY LIVERY COMPANY, APPELLANT,

vs.

GARILLI GUISEPPE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 28, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2113.

ELLSWORTH T. SIMPSON, APPELLANT,

vs.

GARILLI GUISEPPE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1910.

In the Court of Appeals of the District of Columbia.

No. 2113.

ELLSWORTH T. SIMPSON, &c., Appellant,

vs.

GARILLI GIUSEPPE.

a Supreme Court of the District of Columbia.

At Law. No. 52084.

GARILLI GUISEPPE, Plaintiff,

vs.

ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Memorandum.*

At Law. No. 52084.

GARILLI GUISEPPE, Plaintiff,

vs.

ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, Defendant.

November 8, 1909.—Appeal from the Municipal Court of the District of Columbia, filed, showing judgment for plaintiff, October 21, 1909, for $132.29 with interest and costs.

Summons on Appeal from Municipal Court.

Issued Nov. 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 52084.

GARILLI GUISEPPE, Plaintiff, Appellee,

vs.

ELLSWORTH T. SIMPSON, Trading as Parkway Livery Co., Defendant, Appellant.

The President of the United States to the Appellee, Greeting:

The Appellant having docketed an appeal in the Supreme Court of the District of Columbia, from the judgment of the Municipal Court of the District of Columbia, therefore,

You are hereby summoned to appear in said Supreme Court, on or before the tenth day, exclusive of Sundays and legal holi-
2 days, after the service of this Writ on you, and show cause why the said Appellant should not have judgment against you therein.

Witness, The Honorable Harry M. Clabaugh, Chief Justice of said Court, the 8″ day of November, A. D. 1909.

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN,
Assistant Clerk.

LECKIE, FULTON & COX, *Attorney-.*

(Endorsed.)

Nov. 8, 1909.

Please enter appearance, and we accept service of copy of writ.

CHARLES S. SHREVE, JR.,
MASON N. RICHARDSON,
Attorneys for Appellee.

The 8 day of ——, 19—.

Undertaking on Appeal.

Filed Nov. 8, 1909.

In the Municipal Court of the District of Columbia.

No. 52084. No. 2728.

GARILLI GUISEPPE, Plaintiff,
vs.
ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, Defendant.

The defendant, Ellsworth T. Simpson, desiring to appeal from the judgment rendered against him in the above-entitled cause, on the 21st day of October, 1909, to the Supreme Court of the
3 District of Columbia the said Ellsworth T. Simpson and Farley D. Veale his surety hereby appearing and submitting to the jurisdiction of the said Supreme Court, undertake, jointly and severally, to satisfy and pay whatever final judgment may be recovered in the said Court, against said Ellsworth T. Simpson, which judgment they agree may be entered against them jointly. or either of them separately in this case.

Given under our hands this 25th day of October, 1909.

E. T. SIMPSON.
FARLEY D. VEALE.

Approved October 28, 1909.
R. H. TERRELL, *Judge.*

Memorandum.

Appeal bond filed in Municipal Court, October 28, 1909.

Motion to Dismiss Appeal.

Filed Dec. 20, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 52084.

GARILLI GUISEPPE, Plaintiff,
vs.
ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, Defendant.

Now comes the plaintiff, by his attorneys, and moves
4 this Honorable Court to dismiss the appeal to this Court herein, for the reason that such appeal is not properly before this Court, on the ground that there is only one surety on the undertaking on said appeal.

MASON N. RICHARDSON,
CHAS. S. SHREVE, JR.,
Attorneys for the Plaintiff.

Messrs. Leckie, Fulton & Cox, Attorneys for the Defendant:

Please take notice that we will call up the above motion for hearing in Criminal Court No. 2, on December 24, 1909, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

MASON N. RICHARDSON,
CHARLES S. SHREVE, JR.,
Attorneys for the Plaintiff.

December 20, 1909.

Served a true copy of the within motion upon us, acknowledged.
LECKIE, FULTON & COX.

5 Supreme Court of the District of Columbia.

FRIDAY, *January 7th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 52084. At Law.

GARILLI GUISEPPE, Plaintiff,
vs.
ELLSWORTH T. SIMPSON (Trading as Parkway Livery Company).

By Judge Stafford.

Upon consideration of plaintiff's motion filed herein December 20th, 1909, to dismiss the appeal to this Court, "on the ground that

there is only one surety on the undertaking on said appeal," it is ordered that said motion be, and the same is hereby granted. Whereupon it is ordered that said appeal herein be, and the same is hereby dismissed and — considered that plaintiff recover of defendant-appellant and Farley D. Veale, his surety, the costs of suit herein to be taxed by the Clerk and have execution thereof.

Further it is hereby ordered that the papers sent to this court from the Municipal Court of the District of Columbia, be returned thereto with instructions to proceed thereon, according to law.

From the foregoing the defendant by his attorney, in open court, notes an appeal to the Court of Appeals of the District of Columbia, whereupon a bond to operate as a supersedeas is hereby fixed in the sum of Two Hundred Dollars.

6 *Memorandum.*

January 11, 1910.—Appeal bond (supersedeas) filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed Jan. 11, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52084.

GARILLI GUISEPPE
vs.
ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company.

In making up the record on appeal, the Clerk will please include the following:

1. Memorandum of appeal from the Municipal Court showing the date and amount of the judgment of said Court; summons on appeal & acceptance of service.
2. Appeal bond filed and approved in Municipal Court.
3. Motion to dismiss appeal.
4. Order of Court granting motion and dismissing appeal.
5. Memorandum of appeal bond filed herein.
6. This designation.

LECKIE, FULTON & COX,
Attorneys for ellsworth T. Simpson, Appellant.

Designation approved.

CHARLES S. SHREVE, JR.,
MASON N. RICHARDSON,
Att'ys for Plaintiff.

7 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52084 at Law, wherein Garilli Guiseppe is Plaintiff and Ellsworth T. Simpson, trading as Parkway Livery Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of January, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2113. Ellsworth T. Simpson, &c., appellant, vs. Garilli Giuseppe. Court of Appeals, District of Columbia. Filed Jan. 28, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2113

ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, *Appellant*,

vs.

GARELLI GUISEPPE.

BRIEF FOR APPELLANT.

A. E. L. LECKIE,
CREED M. FULTON,
JOSEPH W. COX,
Attorneys for Appellant.

JOSEPH T. SHERIER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2113.

ELLSWORTH T. SIMPSON, Trading as Parkway Livery Company, *Appellant*,

vs.

GARILLI GUISEPPE.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This appeal is from a judgment of the Supreme Court of the District of Columbia, dismissing an appeal from a judgment obtained by the appellee in the Municipal Court, and awarding costs against the defendant (appellant herein) and his surety.

The judgment appealed from was for $132.39, and was rendered by the Municipal Court on October 21, 1909 (R.,

110 U.S. 619

p. 1). On October 28, 1909, an undertaking on appeal was filed in the Municipal Court and duly approved by a judge thereof.

The appeal was docketed in the Supreme Court of the District of Columbia, and summons issued against the appellee on November 8, 1909. On the same day the attorneys of the appellee accepted service of the summons and entered a general appearance (R., p. 2). A motion was subsequently made to dismiss the appeal to the Supreme Court of the District on the ground that there was only one surety upon the undertaking on appeal (R., p. 3). This motion was granted and the judgment from which this appeal is taken was duly entered (R., pp. 3 and 4).

ASSIGNMENT OF ERROR.

The Court erred in dismissing the appeal on the ground that there is only one surety on the undertaking.

ARGUMENT.

The sole question in the case is whether or not under Section 31 of the Code more than one surety is required upon an undertaking on appeal from the Municipal Court to the Supreme Court of the District of Columbia.

Section 31 of the Code is as follows:

> "No appeal shall be allowed unless the appellant, *with sufficient surety,* approved by the justice, shall enter into an undertaking to satisfy and pay whatever final judgment may be recovered in the appellate court, and agree that such judgment may be entered against principal and sureties. Such undertaking must be given within six days, exclusive of Sundays and legal holidays, after the entry of judgment. And where said undertaking has been given the justice shall immediately file the original papers, and a copy of his docket entries, in the office of the clerk of the supreme court, and notify the appellant or his attorney thereof."

* Ridenour v. Chapman 35 W.L.R. 719

The former decisions and rulings of the Supreme Court of the District of Columbia* have been to the effect that one surety upon the appeal bond was sufficient to comply with the provisions of the statute; and the Rules of Practice before the Justices of the Peace were obviously drawn with this construction in mind.

Rule 20 of said rules provides for the giving of two days' notice of the approval of appeal bonds, and that the notice shall contain the name and address of the *surety*. The form of the notice of appeal prescribed under Rule 24 of the said Rules of Practice also provides for the insertion of the name of a *surety*. Likewise the form of undertaking on appeal is prepared with the view of being used for either a surety or sureties. So that prior to the ruling by Mr. Justice Stafford, holding that two sureties are required, it seems to have been the uniform practice of both the Municipal Court and the Supreme Court of the District of Columbia to recognize one surety as meeting the requirements of the statute.

I.

The governing consideration in the interpretation of the section is what was intended thereby. The language is:

> "No appeal shall be allowed unless the appellant, *with sufficient surety*, approved by the justice, shall enter into an undertaking to satisfy and pay whatever final judgment may be recovered in the Appellate Court, and agree that such judgment may be entered against principal and sureties."

Such provisions in statutes are held to be principally for the benefit of the appellee. 2 Cyc., 850; 1 Ency. P. of Pr., 1000. *In re* Bartlett, 82 Me., 210, 211.

It was intended to secure to him the payment of the final judgment of the Supreme Court of the District, and inci-

dentally in securing the same to discourage frivolous and vexatious litigation. To that end *sufficient surety* approved by the justice was required. In view of the established practice governing appeals from the Supreme Court of the District of Columbia to this Court, and from this Court to the Supreme Court of the United States, under which one surety may be sufficient, it would seem anomalous that Congress should intend to require more than one surety to be given in order to provide *sufficient surety* in appeals from the Municipal Court. The appellee's contention is that the meaning of the words *"sufficient surety"* is defined by the words following to the effect that the appellant shall "agree that such judgment may be entered against principal and *sureties,"* and that this use of the plural of surety is equivalent to the declaration that *sufficient surety* means more than one.

Keeping in mind the purpose and necessity of requiring *sufficient surety,* it would seem to be reasonable that the justice might find that one surety was sufficient, even in the absence of any rule governing the interpretation to be placed upon the use of the plural in the statute under consideration. But on page 3 of the Code, it is specifically provided that in the interpretation and construction thereof, the following rule shall be observed:

> "Words importing the singular number shall be held to include the plural, and vice versa, except where such construction would be unreasonable."

In view of this express rule, can it be held in construing the section, which requires only *sufficient surety* to be given, that it is unreasonable to say that the word "sureties" may include the singular? Can any reason be suggested why it is unreasonable to say that the same number of sureties that is sufficient in appeals from the Supreme Court of the Dis-

trict of Columbia and from this Court is not sufficient in appeals from the Municipal Court?

Section 23 of the Code provides that upon the filing of a plea of title the defendant—

> "shall enter into an undertaking with *sufficient surety* to be approved by the justice, to pay all intervening damages and costs and reasonable intervening rent for the premises."

Could it be suggested with any show of reason that more than one surety is required upon such undertaking, and can there be any possible reason for requiring more sureties under Section 31 than under Section 23, both of which intend to provide *sufficient surety?* Are not these considerations which justify the application here of the prescribed rule of interpretation directing that—

> "Words importing the plural number shall be held to include the singular, except where such construction would be unreasonable."
>
> See Sec. 1028 R. S. D. C. (Abert's Comp. Stats., 313).

That the rule of interpretation cited above has been applied by this Court in construing Section 31, is obvious from the language used by Mr. Justice Morris in *Schrot vs. Schoenfeld,* 23 App. D. C., 421, 424:

> "The Code (Sections 30 and 31) peremptorily requires that no appeal shall be allowed from the judgment of a justice of the peace, except upon the condition precedent that an undertaking, with *sufficient surety,* shall be given by the appellant, within six days after the entry of judgment, to satisfy and pay any final judgment that may be recovered in the appellate court; and that such undertaking must stipulate that the judgment of the appellate court may be entered

against both the principal and the *surety or sureties.* No such undertaking was given in this case. No undertaking whatever was given within the time limited by the law. The undertaking which was actually given failed utterly to comply with the requirements of the Code. Its condition was not the condition required by the statute, but a radically different one. An undertaking to pay damages and costs is not an undertaking to pay a judgment; and the omission from the undertaking that was given, of the essential provision that the judgment might be rendered against both the principal and the *surety*, is a radical departure from the requirement of the law."

The Supreme Court of the District of Columbia was governed in its decision by the language of Mr. Justice Duell in the case of *Dowling vs. Buckley, 27* App. D. C., 205. In that case it was held that a bond given on appeal from a justice of the peace in a landlord and tenant case, under Section 1233 of the Code, must, *in order to operate as a supersedeas,* be entered into by two sureties. It is believed that what was said in that case by the learned justice with respect to Section 31, to the effect that the undertaking mentioned therein must be entered into by at least two sureties, was not necessary to the decision of the case and may justly be regarded as obiter.

It was held in *Brown vs. Slater, 23* App. D. C., 51, 56, that the provisions of Sections 1232 and 1233, governing appeals in landlord and tenant cases, are distinct and different from the provisions of Sections 30 and 31, governing appeals in ordinary cases.

And certainly, the language of the Court, speaking through Mr. Justice Morris (quoted above), when the Court was specifically dealing with Section 31, should be entitled to at least equal weight with the language used in the Dowling case when another section was being construed. The question we are considering, if not decided in Schrot

vs. Schoenfeld in favor of the appellant's contention, may at least be regarded as an open one to be examined anew upon its merits.

In *Dane vs. Dane*, 67 N. H., 552, the statute required that a person appealing from a decree of a judge of probate

> "shall give bond with *sufficient sureties* to prosecute his appeal with effect, and to pay all such costs as shall be awarded against him by the Supreme Court." * * *

The Court said:

> "The purpose of the statute is to compel the appellant to furnish security for the payment of such costs as may be awarded against him. This purpose may as well be accomplished by a bond with one surety who is sufficient, as with more. And in the light of the rule provided in our statutes for their construction, that 'words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular,' and in view of the history of the legislation on this subject, it is plain that furnishing a bond with one sufficient surety is a compliance with the statute."

II.

But, even if it could be held that two sureties are intended by Section 31, it is believed that the failure to give the two is a mere defect or irregularity in the undertaking, which could be waived, and not a prerequisite to the jurisdiction, such as the giving of the undertaking which could not be waived.

In *2 Cyc.* 850, it is said:

> "In some jurisdictions the giving of an undertaking on appeal is regarded as a prerequisite to appellate, jurisdiction, and can not be waived; in others it is held

that appellee may waive the undertaking as it is filed for his benefit.

"It seems that in all jurisdictions defects and irregularities in the undertaking may be waived."

Riley vs. Mitchell, 38 Minn., 9, is closely in point. In that case it was held that the execution of the appeal bond by only one surety, when more than one was required by the statute, is not a defect which goes to the jurisdiction, but it is a mere irregularity which may be waived.

In the case at bar the appellee not only made no objection to the approval of the bond on the ground that there was only one surety, but he also entered a general appearance in the Appellate Court.

It is uniformly held that a general appearance is a sufficient waiver of mere defects and irregularities.

1 *Ency. of Pl. and Pr.,* 1000;
2 *Cyc.,* 882.

In *Ives vs. Finch,* 22 Conn., 101, the undertaking on an appeal from a justice of the peace to the County Court was entered into by one surety instead of by more than one, as was specifically required by the Statute. The case was entered upon the docket of the County Court and the attorneys for the appellee entered their appearance. After the entry of the appearance and the time set for the trial of the cause, the appellee's attorneys moved to have the cause stricken from the docket on the ground that the requirement of the Statutes, as to sureties, had not been complied with, and the County Court, accordingly, had the cause stricken from the docket. The Appellate Court, in reversing the action of the lower Court, said:

"In the present case the proper mode of taking advantage of the error on the appeal, was by a plea in abatement, which should have been filed within the time

allowed for filing such pleas. But instead of doing this the plaintiff, without any objection on his part, suffered the appeal to be taken, the bond to be given, the cause to be entered on the docket of the County Court, his attorneys' appearance to be entered, the cause to be continued and then moved to have the cause erased from the docket. In our opinion the objection came too late."

In *Farnam vs. Davis,* 32 N. H., 303, an appeal by defendant from judgment of justice of peace was duly entered and copies filed in Court of Common Pleas. The plaintiff entered appearance as appellee, and the cause was continued. Plaintiff thereupon moved to dismiss the appeal because there was but one surety to the recognizance entered into before the magistrate on taking the appeal, while the Statute required that—

"No appeal from the judgment of a Justice of the Peace shall be granted, unless the party appealing shall enter into recognizance to the adverse party, *with sufficient sureties, etc.*"

The Court said:

"The provision of the statute requiring sureties to the recognizance is wholly for the benefit of the appellee. He may release and discharge it, at his pleasure; and there certainly can be no good reason why he may not waive it, unless it be that without it the Court to which the appeal is taken does not obtain jurisdiction. * * * The irregularity, then, is one which may be waived by the appellee; and we think he is to be considered as having waived it, when, having had reasonable opportunity to avail himself of the objection by a motion to dismiss the appeal for that cause. he neglects to do so.

> "The requirements of the statute for his benefit can be dispensed with only by his consent; but it cannot be considered unreasonable to him, and it certainly is but just to the appellant, to hold that consent is to be understood as given when he enters his appearance in the appellate court and suffers a continuance of the case, without a suggestion that his rights have been disregarded in the mode of taking the appeal."

Many of the cases hold that appeal bonds being purely for the appellee's benefit, all security may be waived by him.

1 *Ency. of Pl. and Pr.*, 1000.

But others hold that since the parties cannot confer jurisdiction by consent upon the appellate court, that a party may not waive all appeal security.

Thus, it has been held in Massachusetts that the requirement that the bond have surety can not be entirely waived.

Henderson vs. Benson, 141 Mass., 219.

But mere defects and irregularities which do not amount to an entire omission of some statutory requirement may be waived.

Folsom vs. Cornell, 150 Mass., 120.
Wheeler Mfg. Co. vs. Burlingham, 137 Mass., 581.

The reason which has governed the courts in these decisions seems to have been first announced in *Brewfages Case*, 10 Coke's Rep., 99. In that case a statute provided that persons might be released by the sheriff upon their giving bond "upon reasonable surety of sufficient persons"; and also provided that if any bond varied from the form prescribed it should be void. It was held that the words "upon reasonable surety of sufficient persons" are added for the surety of the sheriff, "and, therefore, if he will take but

one surety, it is at his peril, for he shall be amerced if the defendant doth not appear, and therefore the statute doth not make the bond void in such case."

See also

Decker vs. Judson, 16 N. Y., 443.
Shaw vs. Tobias, 3 Comstock (N. Y.), 191.
Kesler vs. Haynes, 6 Wend. (N. Y.), 547,

in all of which although two sureties were specifically required, it was held that the requirements might be waived by the party for whose benefit the provision was intended.

The following cases will afford further illustrations of the rule that a general appearance in the appellate court acts as a waiver of defects and irregularities.

Dore vs. Covey, 13 Cal., 510.
Jones vs. Droneberger, 23 Ind., 77.
Jester vs. Hopper, 13 Ark., 43.
Ross vs. Tedder, 10 Ga., 426.
Culliford vs. Pudd, 22 N. Y. Supp., 539.
Greenlee vs. McCalvey, 92 N. C., 530.

It is respectfully submitted that the judgment appealed from should be reversed.

A. E. L. LECKIE,
CREED M. FULTON,
JOSEPH W. COX,
Attorneys for Appellant.

JOSEPH T. SHERIER,
Of Counsel.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1910

ELLSWORTH T. SIMPSON, Trading as
PARKWAY LIVERY COMPANY
Appellant,
vs.
GARILLE GUISEPPE
Appellee.

No. 2113

Brief on Behalf of Appellee.

CHARLES S. SHREVE, JR., AND
MASON N. RICHARDSON,
Attorneys for Appellee.

J. D. BILANS & SONS, LAW PRINTERS, 419 E STREET, N. W., WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1910.

ELLSWORTH T. SIMPSON, *Trading as* PARKWAY LIVERY COMPANY, *Appellant*, *vs.* GARILLI GUISEPPE, *Appellee*. } No. 2113.

BRIEF ON BEHALF OF APPELLEE.

Statement of Facts.

Appellee brought suit against appellant in the Municipal Court of the District of Columbia, for damages sustained by appellee by and through the fault and negligence of appellant's servant, in appellant's service. That on October 21, 1909, in said suit, said appellee (the plaintiff in said suit) obtained judgment against the appellant (the defendant in said suit), in the sum of $132.29 with interest and costs. That thereupon the said appellant did attempt to appeal said judgment to the Supreme Court of the District of Columbia, by filing an undertaking signed by ONE SURETY ONLY, namely, a man

named Farley D. Veale. That the justice in the Municipal Court approved said bond and the cause was filed by said justice in the Supreme Court of the District of Columbia; that on December 20, 1909, this appellee filed in said cause, then wrongfully in said Supreme Court of the District of Columbia, a motion to dismiss said appeal, and assigning as the reason therefor that said undertaking on appeal is insufficient to give said Court jurisdiction on appeal, beecause said undertaking contains ONE SURETY ONLY. That subsequently said motion came on to be heard upon that question ONLY, no other question whatever therein being presented to or considered by the said justice of the Supreme Court therein; and thereupon said justice did sustain said motion to dismiss said appeal, and did thereupon dismiss said appeal, for said reason and did order the papers therein returned to the said Municipal Court aforesaid. Appellant did thereupon appeal to this Court from said finding upon said single matter in issue.

Argument and Brief.

Appellant contends that such undertaking is sufficient with one surety only.

Appellee contends that such undertaking on appeal from the Municipal Court to the Supreme Court of the District of Columbia, was NOT sufficient, but, on the contrary, that to vest in the Supreme Court of the District of Columbia jurisdiction in the subject matter of said appeal, sections 30 and 31 of the Code of Laws of the District of Columbia require that such undertaking shall be signed by two or more sureties, and that the same must be strictly

complied with as a condition precedent to the said Supreme Court obtaining jurisdiction of the subject matter on appeal.

Said sections of the Code of Laws provide as follows:

> "Sec. 30. APPEAL. Where the debt or demand or the value of personal property claimed exceeds five dollars, and in actions for the recovery of the possession of real estate as aforesaid, either party who may think himself aggrieved by the judgment or other final order of a justice of the peace may appeal to the Supreme Court of the District; such appeal to be prayed within six days after the entering of the judgment."
>
> "Sec. 31. UNDERTAKING. No appeal shall be allowed unless the appellant with *sufficient surety,* approved by the justice, shall enter into an undertaking to satisfy and pay whatever final judgment may be recovered in the appellate court, and agree that such judgment may be entered against *principal and sureties.*"

By act of Congress of the United States, approved February 17, 1909, the name of the said "Justice of the Peace" court was changed to the "Municipal Court of the District of Columbia."

Appellee contends that in said section 31, the words "sufficient surety, means sufficient *security;* and that such words apply to the undertaking or security itself, and not to the person signing said undertaking; that the last part of Sec. 31 requires two or more sureties to said undertaking. This question was definitely decided in the case of Dowling v. Buckey, in 27 Appeals D. C., pages 205-208 to this effect, the court therein says:

> "This provision requires that the undertaking shall be in effect a supersedeas bond, and that it must be executed BY AT LEAST TWO SURETIES. True, the phrase "sufficient surety" is employed, but surety as there used does not refer so much to the person giving the undertaking as it does to the security, and that appears more clearly in the latter part of the section which says that any final judgment may be entered against principal and sureties."

Appellee contends that at common law no appeal lay from the decision of a justice of the peace; that the jurisdiction of the Supreme Court of the District of Columbia to hear such cases on appeal is wholly statutory, which statutes are strictly construed and must be strictly complied with as a condition precedent to the creation of jurisdiction in said Supreme Court, on appeal, in the subject matter of the said appeal.

In Grady v. Bundy, 22 Wash. Law Rep., 704, the Court said:

> "At common law no appeal was allowed from a decision of a justice of the peace; but the losing party had four days within which to file a motion for a new trial."

In Schrot v. Schoenfeld, 23 App. D. C., 421, this Court says:

> "Various decisions of the Supreme Court of the United States are cited to show that the taking of security in connection with the allowance of appeal or citation upon writ of error is not jurisdictional in its character, but that its omission affects only the regularity of the proceedings, and that such omission may be supplied in the appellate court

(citing cases). But these and other similar cases were fully considered in Mulvihill v. Clabaugh (21 App. D. C., 440; 31 Wash. Law Rep., 210), and it was there pointed out that section 1000 of the Revised Statutes of the United States, under which those cases were decided, was a DIRECTORY and not a MANDATORY statute, while the rules of this Court, made in pursuance of an express statutory authority, were, in regard to the matter of appeals this Court MANDATORY in their character and JURISDICTIONAL in their effect. The provisions of the Code respecting appeals from justices of the peace to the Supreme Court of the District is even more peremptory than the rules which govern appeals to this Court and the reasoning of the Mulvihill case applies more strongly, if possible, to the former class of appeals than to the latter. There can be no reasonable doubt whatever, that it was the intention of the lawmakers in formulating this provision of the Code to make the filing of an undertaking, such as is there prescribed, an essential prerequisite and condition precedent to the allowance of any appeal. Such provision is in full accord with the general spirit of the policy which remits these small debts to the summary jurisdiction of justices of the peace."

The rule that the singular includes the plural and vice versa, does not apply in these cases. Harris v. Register, 70 Maryland, 119, 109.

This was the only question considered by the Court below, and presented to the Court below, namely, whether or not two sureties are required on such appeal bonds, under said section 31. Under Rule V, Sec. 3, of the Rules of this Court, and the decisions of this Court, questions not raised and considered in the trial court, will not

be considered in this appellate tribunal; that an assignment of error will not be considered on appeal, where the record fails to show that the question involved was raised in the Court below and decided by it.

Crandall v. Lynch, 20 App. D. C.,73.
Eaton v. Brown, 20 App. D. C., 453.
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